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The phone that's bugged may be yours.

Big Brother Lives

The now-celebrated conflict between the Carter administration and the Senate Intelligence Committee over prior notice of covert operations has obscured the fact that the intelligence act now before the committee would, if passed, deal a serious blow to the right of Americans to be free of governmental surveillance of their private and political lives.

The National Intelligence Act of 1980 (S. 2284) is a long and confusing piece of legislation. At its heart are a series of provisions that authorize the surveillance of Americans both at home and abroad using intrusive techniques such as wiretaps and informants. The authorizations are many and the restrictions are few. Indeed, authority for many past abuses could be found buried in the intricacies of this charter.

For many years the White House and the intelligence agencies resisted efforts to establish congressional intelligence committees. They argued that intelligence activities had to be carried out in secret with only the minimal supervision provided by subcommittees of the Armed Services and Appropriations committees. Intelligence fiascos such as the U-2 episode and the Bay of Pigs did not shake this consensus. What finally led each House to create an ad-hoc committee to investigate the intelligence agencies was growing evidence that they had conducted surveillance of American citizens in violation of their charters, the laws of the land, and the Constitution.

The 1975 resolution establishing the Senate committee (the Church Committee) instructed its members to determine "the extent, if any, to which illegal, improper, or unethical activities were engaged in" by the intelligence agencies. The committee also was instructed to look into specific allegations of illegal domestic surveillance by the CIA, domestic intelligence and counterintelligence operations directed at Americans by the FBI, and the origins and disposition of the Huston Plan (the Nixon White House scheme to authorize illegal surveillance of Americans).

Although both the House ad-hoc Committee (the Pike Committee) and the Church Committee explored other issues, including the quality of the intelligence product, their primary focus was on the rights of Americans.

The investigations of the two committees, reinforced by the report of the presidentially appointed Rockefeller Commission as well as newspaper reports and documents released under the Freedom of Information Act, painted a picture of substantial abuses of constitutional rights of Americans by the intelligence agencies, usually with White House approval.

By now, the record of FBI and CIA abuses is well known. But it bears repeating at least in summary form because memories in Washington tend to be very short.

The Church Committee summarized what it had learned as follows:

Too many people have been spied upon by too many Government agencies and too much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power. The Government, operating primarily through secret informants, but also using other intrusive techniques such as wiretaps, microphone "bugs", surreptitious mail opening, and break-ins, has swept in vast amounts of information about the personal lives, views, and associations of American citizens. Investigations of groups deemed potentially dangerous—and even of groups suspected of associating with potentially dangerous organizations—have continued for decades, despite the fact that those groups did not engage in unlawful activity. Groups and individuals have been harassed and disrupted because of their political views and their lifestyles. Investigations have been based upon vague standards whose breadth made excessive collection inevitable. Unsavory and vicious tactics have been employed—including anonymous attempts to break up marriages, disrupt meetings, ostracize persons from their professions, and provoke target groups into rivalries that might result in deaths. Intelligence agencies have served the political and personal objectives of presidents and other high officials. While the agencies often committed excesses in response to pressure from high officials in the Executive branch and Congress, they also occasionally initiated improper activities and then concealed them from officials whom they had a duty to inform.

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Both the Church and Pike committees, with the memory of extensive abuses freshly in mind, recommended substantial limits on the right to conduct surveillance of Americans while expressing the belief that the legitimate intelligence needs of the United States could be met within those limits.

On the key issue of the standard under which surveillance of Americans could be conducted for counterintelligence purposes, the Church Committee recommended that such investigations be based on a finding that the American is consciously working for a hostile foreign intelligence service and engaged in activity that violates the criminal laws of the US.

The Senate reacted positively to the proposal that a permanent committee on intelligence be created to conduct oversight of the intelligence community and to report appropriate legislation, including a charter. The House followed suit in the 96th Congress.

As it relates to the rights of Americans, the new bill has the support of both the administration and the leaders of the Senate Intelligence Committee, though it moves substantially away from the recommendations of the Church Committee. It entirely abandons a criminal standard for investigation of Americans and permits investigations both at home and abroad of any American engaged in clandestine intelligence activity—a term which remains undefined. It also introduces a wholly new rationale for surveillance of Americans, permitting such surveillance if the American possesses foreign intelligence information of interest to the intelligence community.

The fundamental flaw of the new intelligence charter derives from the fact that it was drafted primarily by the intelligence agencies. Their primary concern, quite legitimately, was to ensure that they had all the authority they might need in every conceivable situation to gather information that might be of value for foreign intelligence purposes or counterintelligence. Since circumstances are conceivable in which an American abroad might possess information important to the government, by the logic of the intelligence community, the government should be able to bug, tap, or burglarize without regard for the person involved, even if he or she is in no way connected with a foreign power. To prevent abuse of this authority, the bill assumes that if the president or the attorney general has approved or been informed of such a surveillance, no abuses will occur.

The difficulty with this approach is that it virtually ignores the lessons presented in the Church and Pike reports. Political surveillance often took place because presidents wanted information on their political opponents and pressed the intelligence agencies to produce it.

Indeed, modern political surveillance dates from a request by President Roosevelt to the FBI to investigate Americans who were writing him letters protesting the drift toward war. Since then, almost every president has used the intelligence agencies for such purposes. Attorney generals have been no more dependable in resisting abuses. It was Ramsey Clark who ordered intensive surveillance of the black ghettos; John Mitchell approved every warrantless wiretap of the Nixon administration. One does not have to call into question in the slightest the commitment of the incumbent president and attorney general to the rule of law to question whether high-level approvals are by themselves a sufficient assurance that the power to conduct surveillance of Americans will not be abused.

Whatever else it is, the National Intelligence Act is not easy to understand. Its standards for surveillance of Americans at home and abroad are obscured in a thicket of anomalous and ambiguous provisions and definitions. It is impossible to know which are deliberate and which unintentional or to grasp the full meaning and intent of each grant of authority.

Five years from now a CIA director trying in good faith to obey its dictates in the face of White House pressures would have great difficulty figuring out what he was supposed to do. What, for example, is the standard for gathering positive foreign intelligence? The opening paragraph of the section of the bill dealing with "Collection of Foreign Intelligence" reads as follows:

Sec. 213. (a) Collection of foreign intelligence by means of covert techniques shall not be directed against United States persons, except in the course of collection of counterintelligence or counterterrorism intelligence, or in extraordinary cases when authorized in accordance with this section.

The paragraph appears to permit the use of all non-"covert" techniques to conduct surveillance of Americans who are in possession of foreign intelligence information. Paragraph (d) of the same section confirms this, again in the negative, by stating that only the FBI may conduct such investigations within the United States. Turning to the definitions section one discovers that "foreign intelligence" includes "information pertaining to the capabilities, intentions, or activities of any foreign states, government, organization, association or individual."

Thus, in its present form, the charter permits the president and the attorney general to authorize the FBI at home and the CIA abroad to use all clandestine techniques short of electronic surveillance and burglaries to investigate any American who possesses any information relating to an individual foreigner or a foreign organization or government. The person under surveillance need not have done anything illegal or be in covert contact with a foreign government. The person

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need only have in his or her possession information the governments want. This means that any American returning from overseas, in regular or occasional contact with foreigners, or with knowledge of foreign matters, is subject to having his or her records seized without notice, organizations infiltrated, and to any number of covert forms of eavesdropping. It is difficult to imagine a more sweeping power. No American of any interest to the intelligence services would fail to qualify for surveillance under this standard.

Standards for "counterintelligence"—efforts to learn about the activities of foreign intelligence services and to neutralize them—are equally hazy. Counterintelligence investigations are permitted "only on the basis of facts or circumstances that reasonably indicate that the person is or may be engaged in clandestine intelligence activities on behalf of a foreign power."

Strangely enough, S. 2284 never bothers to define "clandestine intelligence activity." One gathers that this is because the administration and the Senate Intelligence Committee did not agree on what would constitute such activity. If this is so, they have failed to agree on the single most important concept in the charter.

If clandestine intelligence activity were to be defined as illegal activity conducted for a foreign intelligence service, there would be little problem. The intelligence community, however, prefers a much looser definition. Here, for example, is how the CIA defined the term in its implementing directive to the Carter Executive Order on Intelligence (12036):

'Clandestine intelligence activity' means an activity conducted for intelligence purposes or for the purpose of affecting political or governmental processes by or on behalf of a foreign power in a manner tending to conceal from the United States Government the nature or fact of such activity or the role of such foreign power, and any knowing activity conducted in support of such activity.

There is nothing in S. 2284 that would prevent the intelligence community from continuing to use that definition. But under such a standard, couldn't the antiwar movement have been under surveillance on the grounds that it might be concealing the fact that it was agitating for an end to the war on behalf of the Viet Cong? Couldn't anyone working for legislation that would aid a country such as Israel or Greece or Pakistan be put under surveillance if the government suspected that he or she was doing so at the request of the foreign government?

One simply cannot know what this section of the bill authorizes. What is clear is that infiltration of organizations, access to financial records, use of informants, mail covers, and physical surveillance are all authorized. It also authorizes counterintelligence and counterterrorist activities directed against Americans at home and abroad. Such activities may be

undertaken "to counter or protect against clandestine intelligence activity of a foreign government"; are we supposed to be reassured by the caveat in section 111 (e) that the intent is not to authorize actions taken for the purpose of depriving any person of any rights secured by the Constitution?

What is one left with? As FBI director William Webster admitted before the House Intelligence Committee, the intelligence community may undertake the kinds of disruptive actions that were part of COINTELPRO—false letters, agents provocateurs, stimulation of violence—even if the recognized consequence is to disrupt lawful political activity. Without suggesting that the intelligence community intends to use such power once it is formally established, one may still ask: where is it prohibited?

A third independent authority to collect information about Americans covers those who are judged to be potential sources of intelligence information. With the consent of the head of the agency doing the collection and with notice to the Department of Justice, any technique save mail covers, electronic surveillance, and burglaries may be used against any American to determine if that person or anyone else should be recruited by the agency. Files released under the FOIA to antiwar activists and other critics of American policy show that the CIA often conducted investigations of such individuals in order to decide whether to approach them for operational assistance, and often continued such investigations for years. Have the administration and the Senate committee forgotten that the FBI investigated Daniel Schorr because the president said Schorr was being considered for a job?

S. 2284 also would authorize secret searches. Agents of the FBI at home could break into homes without first knocking and could seize or photograph material without leaving behind a warrant or a list of what was seized. The Fourth Amendment prohibits this, and there is no "national security exception" to these rules. This would have permitted Richard Nixon to direct the CIA to bug the hotel room of Joseph Kraft in Paris to learn what the Hanoi negotiating team had told him. The FBI, of course, did bug Kraft, but everybody including the Nixon White House saw it as an illegal act.

It is dangerously naive to believe that we will never again be in a period of domestic political controversy akin to the Vietnam and civil rights struggles. Indeed, the controversy over nuclear power and the draft are now accelerating; it is not difficult to imagine other such controversies in the 1980s. The role the intelligence agencies will play in future domestic disputes will be determined by how Congress deals with this legislation.

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Thus far, the Senate Intelligence Committee has focused only on issues that currently are dividing the administration and the intelligence committees. It should now begin to explore the meaning of the sweeping powers this charter allows for surveillance of Americans. It should propose, and Congress should legislate, some simple, clear rules and require the intelligence community to operate under them—even if that means some diminution of their ability to conduct surveillance of Americans. Such rules should at least require that Americans not suspected of illegal activity should not be subject to surveillance; highly intrusive techniques such as wiretaps should be banned for use on Americans at home and abroad, except where there is probable cause of criminal conduct, as required by the Foreign Intelligence Surveillance Act; and finally, that Americans abroad should be treated no differently than Americans at home.

If Congress does nothing, or if it enacts the National Intelligence Act of 1980 as written, we will have ignored the warning of the Church Committee that "unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature."

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